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No. _____

In The

Supreme Court of the United States

October Term, 1994

SYED WAHIDUL ISLAM and
MAHABUB ALAM BHUIYAN,

Petitioners,

v.

CREATIVE TOURS MICRONESIA, INC.,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

JAY H. SORENSEN
P.O. Box 1184
Saipan, MP 96950
(670) 234-1414

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

Whether an employer has a duty to inquire whether an employee has a driver's license where the employer knows the employee will be driving company vehicles and will have 24-hour access to them.

Whether the circuit court majority erred in reversing the district court's finding of fact that an employer was negligent in entrusting its vehicles to an employee who had no driver's license for failing to ascertain his fitness to drive where the employee was an alien hired illegally, he never indicated that he was licensed, he indicated no job experience involving driving, had no car, and had caused one accident that resulted in a lawsuit that was pending when he was hired.

Whether the circuit court erred in basing its decision on the conclusion that plaintiffs pled a theory of negligent entrustment as distinguished from negligent hiring, where the complaint alleged an employer-employee relationship, that fact was uncontroverted, part of the findings of fact, and was part of the district court's conclusion that there was culpable negligence.

LIST OF PARTIES

The caption of the case in this court contains the name of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit.

Pursuant to Rule 29.1, the following entities are related to Creative Tours Micronesia, Inc., as parent corporations: (1) Pacific Creative Services, Inc., a Hawaii Corporation, and (2) Jalpak Co., Ltd., a Japan Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on September 2, 1994 (Cir. Ct. No. 92-16684).

OPINIONS BELOW

The September 2, 1994 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is Case Number 92-16684, dated September 2,

1994, which decision is unpublished. It is reprinted in the appendix to this Petition. (App. 1-8).

The prior judgment after bench trial of the United States District Court for the Northern Mariana Islands, entered on August 25, 1992, in Civil Number 91-0024, was not published. It is reprinted in the Appendix. (App. 19-20).

STATEMENT OF JURISDICTION

The memorandum decision of the Court of Appeals was filed on September 2, 1994. A petition for rehearing and suggestion of rehearing en banc was timely filed. By order of February 23, 1995 the motion was denied. A copy of that order is reprinted in the appendix. (App. 21). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Review is warranted because a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision and has decided a federal question in a way that conflicts with applicable decisions of this Court. Rule 10.1(a) and (c), Supreme Court Rules of the United States.

STATUTORY PROVISIONS INVOLVED

The Commonwealth Code provides as follows:

> Absent CNMI statute, CNMI case law, or local customary law, the rules of the common law as

expressed in the restatements of the law approved by the American Law Institute are the rules of decision when applying CNMI law. 7 CMC §3401 (1984).

The Restatement (Second) of Torts (1965) provides:

Section 308. *Permitting Improper Person to Do Things or Engage in Activities.*

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Section 390. *Chattel for Use by Person Known to be Incompetent.*

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

STATEMENT OF THE CASE

Overview.

This case arises form a single car accident occurring on March 15, 1991 on the island of Saipan in the Commonwealth of the Northern Mariana Islands. Defendant's

employee (referred to as "Ronnie"), who did not have a driver's license, was driving one of defendant's cars while off duty. With plaintiffs as passengers, he operated the car so negligently that he lost control and drove off the road, colliding with parked cars and severely injuring plaintiffs.

The case proceeded to trial on a theory of negligent entrustment. Trial was before the district court judge sitting without a jury. After two days of trial, the court found for plaintiffs, entering judgment and extensive findings and conclusions on August 25, 1992. Defendant appealed.

The Circuit Court of Appeals, in a two to one decision, reversed the district court on both: (1) its factual finding that defendant knew or should have known that Ronnie's operation of their vehicles involved an unreasonable risk of harm to others, and (2) on its legal conclusion that an employer has a duty to determine if an employee holds a driver's license when it knows the employee will have free and unsupervised access and will be driving company vehicles.

Jurisdiction of Lower Courts.

48 U.S.C. §1694a(a) gives the District Court of the Northern Mariana Islands jurisdiction equivalent to that of a District Court of the United States, including, but not limited to, diversity jurisdiction. Here, jurisdiction was based on diversity of alienage pursuant to 28 U.S.C. §1332(a)(2) and (d) in that plaintiffs are citizens of Bangladesh and defendant a corporation organized and existing under the laws of the Territory of Guam.

48 U.S.C. §1694(c) makes the rules of practice and procedure made effective by Congress or the Supreme Court of the United States applicable to the District Court of the Northern Mariana Islands and appeals therefrom, specifically including Title 28, United States Code. Thus, 28 U.S.C. §1291 and §1294(4), construed with 48 U.S.C. §1694c(b), gave the Court of Appeals for the Ninth Circuit jurisdiction.

The Material Facts[1]

Plaintiff's are two citizens of Bangladesh who entered the Commonwealth pursuant to the CNMI's unique alien labor laws.[2] (Finding No. 1). Defendant is a Guam Corporation doing business in the territory of Guam and in the CNMI on the island of Saipan, in the business of conducting tour groups from Japan to Guam and Saipan. (Finding No. 2).

Creative Tours had some vehicles that were used by its personnel for their transportation to and from hotels

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[1] The facts herein related are taken mainly from the Findings of Fact entered by the District Court, reprinted in the appendix at pages 9-18. To the extent those facts are supplemented, references are to the reporter's transcript, designated RT and page and line number(s).

[2] 3 CMC §4411 et seq. The laws of the United States relating to immigration and naturalization have only limited application to the Commonwealth, thus authorizing the CNMI to regulate the entry and employment of aliens within the Commonwealth. Sec. 503(a), Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, P.L. 94-241, 90 Stat. 263 (March 24, 1976), reprinted as amended in 48 U.S.C.S. §1681 note (L.Ed. 1995).

and the airport. The vehicles included a 1990 White Toyota Corolla leased by and under the control of Creative Tours. (Finding No. 3). Although the company policy was that the company's vehicles were only to be used for business purposes, the vehicles and their keys were available to its employees at all hours of the day and night without any system of checking them out or record-keeping. (Finding No. 4)

On January 8, 1991, Creative Tours hired Mohammed Nazul Islim, known as "Ronnie", to be part of their airport division, to assist members of tour groups with check-ins and baggage at the airport and hotels. (Finding No. 5). Like plaintiffs, Ronnie was also a citizen of Bangladesh. (RT 11:13-14). Creative Tours knowingly hired Ronnie illegally – that is, without going through the steps required by the CNMI law for issuance of an alien work permit. (RT 11:15-12:25). Because of this, Ronnie's qualifications and experience for the job were never documented, as they otherwise would have been if the law had been followed.[3]

Although the general manager who hired Ronnie explained to him that he would be required to operate a motor vehicle in performing the job, neither he, nor anyone else at Creative Tours, asked or otherwise determined if Ronnie had a driver's license. (Findings 8, 9). Nor did they ask or otherwise determine anything about Ronnie's driving experience or qualifications. (Finding 12). Rather

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[3] Under the CNMI Non-resident Worker Law, at least two years experience in the job category the prospective worker is to fill is required to be documented by affidavit. 3 CMC §4434(b).

than asking, the manager simply assumed an employee would tell him if he was not licensed. (RT 213:7-12).

In fact, Ronnie was never issued a driver's license. (Finding 11). He had only limited driving experience before being hired by Creative Tours, having previously worked as a stevedore and security guard, neither of which required him to drive. (Finding 13). As to his driving experience, in August 1989, Ronnie took a car leased to a friend without his permission and got into a two-car collision in Saipan. That collision resulted in a lawsuit charging Ronnie with negligence, and wherein insurance coverage was denied because of Ronnie's not having a driver's license. That case was on file and pending in the U.S. District Court for the Northern Mariana Islands when Ronnie was hired by Creative Tours. (Finding 14).

On March 15, 1991, plaintiffs were at a birthday party which Ronnie also attended. (Findings 16, 17). After the party, Ronnie offered one of the plaintiffs a ride home in Creative Tours' Toyota Corolla, which Ronnie had used to come to the party. The two plaintiffs and three others got into the car and Ronnie drove. (Findings 18, 20). Once on the roadway, Ronnie began accelerating, passed two or three cars, made unsafe lane changes, drove faster than the speed limit and ignored a request by one of the plaintiffs to slow down. Eventually, he lost control and went off the road, hitting parked cars. (Finding 21).

Plaintiff Islam suffered a subluxation of the cervical spine which eventually required surgical fusion of the

C2-C3-C4 vertebral joints, resulting in a permanent disability. (Findings 26, 27). Plaintiff Bhuiyan suffered fractures in each clavicle and other injuries. (Finding 25).

ARGUMENT

I

Creative Tours Had a Duty to Ascertain Ronnie's Fitness to Drive its Cars

For two independent reasons Creative Tours was under a legal duty to check into Ronnie's qualifications to drive. First of all, the Commonwealth's rules of decision, as embodied in the Restatement, required it; and, secondly, if common law principles and considerations of policy are applied, the same result obtains. Applicable case law does not dictate a different result.

A. The Restatement.

Restatement (Second) of Torts, Section 308 imposes liability upon an actor who "knows or should know" that a third person permitted to use the actor's things or engage in activities under the actor's control will create an unreasonable risk of harm.

"The words 'should know' are used throughout the Restatement of this Subject to denote the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such

fact exists." Rest. 2d, Torts, §12(2). The comment amplifies: " 'should know' indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or nonexistence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty." Rest. 2d, Torts, §12(2), com. a. The Restatement is quite clear then, that when someone gives another a particular instrumentality or undertaking there is a duty to ascertain if he has a minimum level of competence for that activity, "or is one of a class generally recognized as being incompetent or likely to be so". Rest. 2d, Torts, §307, com. a. An unlicensed driver would be in such a class. Moreover, the restatement recognizes that the employer-employee relationship is a special one giving rise to a greater duty to ascertain fitness. *See*, Rest. 2d Torts, §307, com. b; §308, com. c.

The Restatement provided the rules of decision for the determination of CNMI law. 7 CMC §3401. Therefore, it was required to be applied in this diversity case. 28 U.S.C. §1652; *Erie RR v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). It was correctly applied by the district court, but these important aspects of it were ignored or overlooked by the circuit court majority.

B. Policy Considerations.

In negligence law, "it should be recognized that duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *First Ins. Co. of Hawaii, Ltd. v. International Harvestor Co.*, 659 P.2d 64, 67 (Haw. 1983) *quoting* W.

Prosser, *Handbook of Law of Torts* (4th ed. 1971) §53, pp. 325-26.

The court did not take policy into consideration at all. Yet it has been recognized that policy analysis is mandatory to determine whether duty exists. *See, Hayes v. Nagata,* 730 P.2d 914 (Haw. 1986) ("It is *incumbent* upon the court to weigh the considerations . . . "); *Isaacs v. Huntington Mem. Hosp.,* 695 P.2d 653, 658 (Cal. 1985) ("Several factors *must* be weighed . . . ") (Emphasis added).

The different factors to be weighed are pretty consistently recognized. *See,* e.g., *Thompson v. County of Alameda,* 27 Cal.3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980); *Observatory Comp. v. Daly,* 780 P.2d 642 (Colo. 1989). The important considerations here are:

1. *Foreseeability of harm.* Failure to take precautions that drivers are competent to operate vehicles they are allowed to use creates a greater likelihood of auto accidents and a corresponding decrease in the level of safety to those of the general public using the roadways.

2. *Policy of preventing future harm.* Conversely, by requiring drivers to have the minimum level of competence a license represents, vehicle owners will minimize the likelihood of future accidents.

3. *Moral blame.* Creative Tours' disregard of any safety measures or practices should be discouraged and is worthy of sanction.

4. *Insurance availability.* It is common in the CNMI for auto liability insurance policies to exclude non-licensed drivers. Therefore, even if they are driving

insured vehicles, the greater presence of unlicensed drivers means more accident victims will go uncompensated.

5. *Burden and social utility of defendant's conduct.* The burden on an employer to determine whether its potential drivers are licensed is practically nil. In addition, there is no utility in encouraging employers to remain ignorant of their employees' qualifications.

If left to stand, this decision will encourage employers to remain ignorant of employee qualifications. Such a policy is particularly poor for the CNMI, where about 40 percent of the population are alien workers and many, like Ronnie, overstay their work permit, work illegally, without a permit and outside the job category approved for them by the CNMI Division of Labor. Logically, more unlicensed drivers whose fitness is untested may be expected on the roads and more accidents will occur.

The Commonwealth requires vehicle operators to be licensed for good reason. It has been noted that a "very substantial interest in highway safety compels the licensing of motor vehicle operators." *First Insurance v. International Harvestor, supra* at 68.

"Numerous courts have determined that entrusting a car to an unlicensed driver is tantamount to entrusting a car to an incompetent driver, and therefore an independent act of negligence." *Seward v. Griffin,* 452 N.E.2d 558, 563 (Ill. App. 1983) (citations omitted). In other courts the fact that the driver was unlicensed makes for a prima facie case of negligent entrustment. *Owens v. Carmichael's U-Drive Autos,* 116 Cal. App. 348, 2 P.2d 580 (1931).

C. Case Law

1. Yoo v. Ouitugua

After oral argument, while the appeal was under submission, the Supreme Court of the Commonwealth of the Northern Mariana Islands handed down its decision in *Yoo v. Ouitugua* (Appeal No. 92-001, May 12, 1994). (App. 25). That case represents the only Commonwealth precedent concerning negligent entrustment. In it the CNMI Supreme Court affirmed liability where the driver was unlicensed, but was also underage and ineligible for a license, which his mother, the owner, knew.

While the circuit court majority purports to follow *Yoo*, in fact it did not. Rather, the majority merely refers to a single sentence in the *Yoo* opinion which paraphrases section 390 of the Restatement of Torts. Ignored is the much more pertinent discussion about the requirements, the purpose and the importance of licensing. (App. 30-31). Also ignored is this language: "Because an automobile is a dangerous instrumentality in the hands of inexperienced, youthful and unqualified drivers, such traffic laws are necessary for the safety of the public and must be strictly enforced." *Yoo* at 6. (App. 30). Thus, the *Yoo* decision imparts two important points: (1) the CNMI driver's licensing statutes are not merely regulatory and revenue-raising, but are for the purpose of determining driver fitness and preventing unsafe drivers from using the commonwealth's roads; and (2) an automobile can be a dangerous instrumentality. The first point indicates that failure to have, or to require an entrustee to have, a

license creates an unreasonable risk of harm. The recognition that an automobile may be a dangerous instrumentality means that the degree or standard of care which an owner or operator is required to exercise is elevated. *McNear v. Pacific Greyhound Lines*, 146 P.2d 34 (Cal. App. 1944). Thus, *Yoo* indicates that the licensing of drivers is so important that one who has a special relationship of control such as a parent to his child or a master to his servant, must require that the operator have a license before entrusting a car to him.

2. Other Case Law.

In the decision the majority criticizes the dissent for citing no authority that an entrustor has any different duties where it is the employer of the entrustee. (p. 4; App. 4). But such authority does exist. Most notable is a decision from another circuit, *Crockett v. United States*, 116 F.2d 646 (4th Cir. 1940), *cert. denied*, 314 U.S. 619 (1941), in which the court held that "[i]t was the duty of [employer] in the selection of [employee] as his agent to use reasonable care to ascertain his competency to drive a car and the existence of habits which would make it unsafe to place so dangerous an agency in his charge. The owner owed a duty to the public to know something about the character and habits of an employee in whose charge he placed an automobile." *Id.* at 651. See also, *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570 (Tex. 1985) (negligence from failure to ask if employee-driver had commercial license); *Southwestern Bell Tel. Co. v. Davis*, 582 S.W.2d 191 (Tex. App. 1979) (negligence found for failure to inquire as to employee's driving record).

In light of this precedent, the majority erred in concluding that "every other court to address the question has treated employer-entrustor just like any other entrustor." (p. 4; App. 4). In fact, in only one of the cases cited in the decision was there an occasion to address the issue of whether an employer has any duties of inquiry.[4] None of the cited cases involve a situation where the employee-driver was not properly licensed. Therefore, it can be said that in all of the cases where the question has been addressed, it has been held that there is an affirmative duty to ascertain fitness before entrusting a vehicle to an employee.

II

The Circuit Court Majority Failed To Apply the Proper Standards In Determining That the Findings Were Clearly Erroneous

Liability for negligent entrustment of a vehicle is determined by applying general principles of negligence, and ordinarily it is for the trier of fact to determine whether an owner has exercised the required degree of care. *Allen v. Toledo*, 109 Cal.App.3d 415, 167 Cal.Rptr. 270 (1980). According to the Restatement, in this instance it was for the trial judge as the trier-of-fact to determine the

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[4] *Abraham v. S.E. Onorato Garages*, 446 P.2d 821 (Haw. 1968) held no duty to inquire about his criminal record under the circumstances where employee had already been working three years, had performed exemplary service during that time, was successfully bonded, previous job checked out and had a valid driver's license. By implication, the case is authority that under different, less reassuring circumstances, such a duty would arise.

standard of conduct necessary to prevent unreasonable risk of harm to others from the facts presented. Rest. 2d, Torts, §285(d).

The district court concluded that Creative Tours had negligently entrusted its vehicle to Ronnie, both in terms of Section 308 and Section 390 of the Restatement (Second) of Torts. (App. 17). Prefacing the Conclusions of Law, the district court states that they are to be considered findings of fact as well. (App. 15). This is appropriate because the determination of negligence is a mixed question of law and fact. *Bunting v. U.S.*, 884 F.2d 1143 (9th Cir. 1989). On appeal, the mixed question of law and fact whether the established facts constitute negligence is an exception to the general rule that mixed questions are reviewed de novo; the Court of Appeals reviews the district court's findings and conclusions regarding negligence under the clearly erroneous standard. *Louie v. U.S.*, 776 F.2d 819 (9th Cir. 1985).

The parameters for review of findings by a district court have been summarized.

> The district court's decision can be overturned only if clearly erroneous. We cannot retry issues of fact nor supplant the district court's judgment with that of our own. We must consider the district court's findings as presumptively correct. We are required to take the evidence as a whole, and consider it in the light most favorable to appellees. *State Farm Mut. Auto. Ins. Corp. v. White*, 563 F.2d 971, 977 (9th Cir. 1977).

Here, the majority did not consider the findings in the light most favorable to appellees, did not presume them

correct and did substitute its judgment for that of the district court.

The Supreme Court has also emphasized the deference that must be given the district court's findings under the clearly erroneous standard.

> This standard plainly does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. [citation] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

As further explained in *Anderson*, this is so not only because of the trial judge's superior position to decide the facts, but also his experience and expertise in doing so, and because the parties should not have to try the facts of the case a second time on appeal. *Id.* at 574-575, 105 S.Ct. at 1512.

Negligence requires knowledge of the peril one's actions are putting others in. But there is something the

law deems to be the same as that knowledge: the opportunity by the exercise of reasonable diligence to acquire knowledge. *Nisbet v. Van Tyl*, 241 F.2d 874 (7th Cir. 1957).

> Every person is under a duty to exercise his senses and intelligence in his actions in order to avoid injury to others, and where a situation suggestions investigation and inspection in order that its dangers may fully appear, the duty to make such investigation and inspection is imposed by law. * * * One under duty to use care for which knowledge is necessary can not escape liability for negligence because of voluntary ignorance. *Id.* at 877.

The district court found that the management of Creative Tours had the opportunity, in the exercise of reasonable diligence, to ascertain Ronnie's driving qualifications, but voluntarily remained ignorant. In other words, they were negligent because "a reasonable man would recognize the necessity of making further investigation." Rest. 2d, Torts, §289, com. j. Given the circumstances existing when Ronnie applied for work, the duties involved, the open opportunity allowed for abuse of the company vehicles and the status and background Ronnie did disclose, it simply cannot be rationally concluded that the district court's finding is not plausible when considered in its most favorable light.

The district court judge understood the facts much more fully than the circuit court justices, who sit over 6000 miles away and have never experienced the unique blend of culture, language, mores and customs that this Micronesian island community offers. As an example of how the majority did not fully appreciate all the facts, the

decision concludes that failure to have a written contract with Ronnie would not lead Creative Tours to suspect he could not drive competently. (App. 6). That might be true in the United States, but here in the CNMI things are different. Because we control our own immigration and the U.S. Immigration and Naturalization Service has no jurisdiction here, and because the U.S. minimum wage standards do not apply here, a large number of aliens supplement the work force. For the most part the workers are unskilled or semi-skilled from lesser-developed countries. The process of hiring such workers is highly regulated to serve the policy of giving preference for jobs to local citizens. 3 CMC §4411(a). Alien workers are permitted to work in only one particular job, i.e., for only one employer and in only one job category. 3 CMC §4437(e). To obtain a work permit, the alien applicant's qualifications and work experience must be documented by affidavit which shows a minimum of two years experience in the job category and verifies their occupational qualifications by letters of reference. 3 CMC §4434(b). Contracts must be in writing and conform to certain statutory requirements and be approved by the Chief of Labor. 3 CMC §4433. Employers must verify certain percentages of the work force to be resident workers as a precondition to employing aliens. 3 CMC §4436(a). A bond is required of the employer. 3 CMC §4435(a). After approval, the worker receives a work permit card that identifies him, the employer, the job title, the expiration and assigns a number to the agreement. 3 CMC §4435(a). Hiring someone in violation of these provisions is a crime. 3 CMC §4447(e).

Despite the fact that Creative Tours' management knew about the legal requirements for hiring aliens, they hired Ronnie illegally with none of the requirements fulfilled. This meant that his personal and educational background, and his job history and qualifications, which would ordinarily have been documented as a matter of course, were unknown and unverified. But they chose to remain voluntarily ignorant of all things except whether Ronnie could speak and deal with their Japanese clientele.

The district court, whose civil caseload is over one-third labor complaints from alien workers, possesses a familiarity with the local labor laws and regulations, and the general situation as it relates to employment of alien workers. He also drives the roads, knows their special characteristics, and understands the risk peculiar to driving on Saipan. The circuit court was required to give the district court's findings of fact greater deference. The finding that Creative Tours should have, in the exercise of reasonable diligence, inquired about Ronnie's qualifications to drive is not implausible; it is not clearly erroneous.

III

The Circuit Court Decision Goes Against the Precepts of the Federal Rules of Civil Procedure In Attempting to Justify Its Conclusion

The decision of the majority creates a dicotomy between Creative Tours' capacity as an entrustor and as an employer, and assumes that it "has been sued only as an owner, . . . " and not as an employer. (p. 4; App. 4). It

does so by concluding that "Islam's complaint charged Creative Tours with negligently entrusting an automobile to Ronnie Islim, not with negligently hiring him . . . ". *Id.* This device of dissecting the roles of an employer in order to avoid dealing with one of the key facts in the case is inconsistent with and contrary to procedural and substantive law.

The complaint plainly alleges that Ronnie was an employee and that Creative Tours negligently entrusted the Toyota to him. (App. 23). The majority decision implies that had plaintiffs used the word "employee" instead of "operator" in paragraph 9, then the decision might be different. (p. 4; App.4). This is plainly wrong. It runs contrary to the basic tenets and purposes of the Federal Rules of Civil Procedure. Rule 8(f) requires that all pleadings be construed to do substantial justice.

> Thus the parties in federal suit are granted the relief to which they are entitled under the facts. 'The legal rights of [the parties] are determined by the law and facts as established in the case and not by some language in the claim.' A party should not have to discover at trial that a chosen legal theory is the 'wrong' one, and the choice of the 'wrong' theory will not preclude recovery under a 'correct' one.
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> . . .
>
> It is thus sufficient if the prevailing party shows it is 'entitled to any relief the court can grant regardless of whether it asks for the proper relief.' A party may further state the same claim alternatively or hypothetically in the same count or in separate counts, and will not be required

> to make an election between inconsistent theories. And Rule 15 allows pleadings to be amended during and after trial, changing the legal theory of the case. *Even without an amendment, however, a party is entitled to any relief justified by the evidence.* 2A *Moore's Federal Practice,* sec. 8.14, pp. 8-75-76. (Emphasis added).

See also, Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); *Janke Construction Co. v. Vulcan Materials Co.,* 527 F.2d 772, 776 (7th Cir. 1976) ("the fact that [plaintiff] misconceived the legal theory of his case does not preclude it from obtaining relief under another theory."); *Sessions v. Chrysler Corp.,* 517 F.2d 759, 761 (9th Cir. 1975).

The complaint must be considered in its entirety, and it is not proper to consider parts of it separately from the whole to draw inferences unintended by the pleader. *Banco Continental v. Curtiss Nat. Bank of Miami Springs,* 406 F.2d 510 (5th Cir. 1969); *Buchanan v. Seaboard Air Lines R.G.,* 80 F. Supp. 976 (D.C.S.C. 1948).

Especially on appeal it is wrong to decide the case on what theory was pled. *Conley v. Amalgamated Sugar Co.,* 263 P.2d 705, 706 (Idaho 1953) (" . . . judgment aids the pleadings, which then must be liberally construed to sustain the judgment."); *Genova v. Johnson,* 321 P.2d 1050 (Or. 1958). The case has already been tried with employment and the circumstances of hiring as being part of the operative facts. In fact, the conclusions of law specifically

include reference to Ronnie as an employee of Creative Tours, and its failure to check his qualifications in the context of that relationship. (See Conclusions of Law Nos. 6-8; App. 17).

The basis of the majority's decision, therefore, rests on a theory that: (1) was never briefed or argued by either party, (2) is contrary to the letter and spirit of the Federal Rules of Civil Procedure, and (3) ignores facts that were uncontradicted at trial and part of the findings and conclusions. The majority impliedly concedes its own error by stating that it is admitted in the decision that the dissent may be correct if the issue were framed in terms of an employer's duty.[5]

CONCLUSION

This case does not offer issues with nationwide impact that will affect large numbers of people. Admittedly, even in the microcosm of this small island community, these two men are not counted among the prominent or important people. But this is a clear, indeed, egregious case where a United States Court of Appeals has erred – erred in terms of how it has applied not only substantive law but also how it has interpreted and applied procedural rules well settled by this Court, in order to overturn findings of the District Court.

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[5] "The dissent misconstrues what is at issue here. It contends that 'an employer's duty to inquire about qualifications must turn on the circumstances of, and the risks being created by, the employment.' Dissent at 2. Perhaps so." (p. 4; App. 4).

These errors manifest a departure by the court of appeals so far from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision; and it has decided a federal question (i.e. application of the "clearly erroneous" standard and application of the standards of pleadings under the Federal Rules of Civil Procedure) in a way that conflicts with applicable decisions of this Court. In so doing, the court of appeals has replaced justice with an injustice.

Petitioners pray that the Court grant certiorari for review of this case.

Respectfully submitted,

JAY H. SORENSEN
P.O. Box 1184
Saipan, MP 96950
(670) 234-1414

Attorney for Petitioners.